

## Are Remote Trials the Way of the Future?

**Credit to Tyson & Mendes, La Jolla, CA**

With the current health pandemic lingering on longer than most people expected, courts have been struggling to find ways to get cases moving forward in light of extended court closures and the inability to assemble jurors. On August 11, 2020, a court in the Fourth Circuit for Duval County held a one day damages trial involving a plaintiff dancer and a bar owner. Jurors were summonsed in the normal fashion, but given instructions for Zoom appearances. Jury selection occurred all via the Zoom platform. While admittedly not ideal for longer, more complicated cases, the process seemed to work for a simple one day damages trial. Albeit the defendant was an empty chair at trial, so plaintiff was simply proving up her default case.

More states are experimenting with remote trials. Texas, for example, has held fully remote jury trial pilots resulting in non-binding verdicts. Another Florida court last month conducted a hybrid trial, where jury selection was remote, but the trial itself was in person. California courts with larger capacity have been experimenting with assembling juries in gymnasiums and social distancing in the court room, but have not held any fully remote civil trial yet. The debate continues about whether remote jury trials are a good idea. Whether they are a “good” idea or not, it is expected more courts will follow Florida’s example and begin exploring more ways civil trials may be conducted remotely.

Judge Bruce Anderson and plaintiff’s attorney both admitted remote trials are not ideal, and cannot replace being in a live courtroom with people present with one another. However, since what is ideal is not possible in this pandemic, more courts may be less willing to postpone live civil trials any longer, as the pandemic continues. Also, even after the pandemic ends, our society will likely be social distancing and taking other precautionary measures long into the future, which may further prompt the need for a remote method of trying civil cases.

Remote trials do create some interesting challenges that could affect the outcome of a trial. Jurors appearing via Zoom will not be able to be monitored as closely as in a live setting so they may have access to cell phones and social media during the trial. In the Florida Zoom trial, court personnel were creating different zoom backgrounds to re-create the feeling of being in a live court room. It is difficult to appreciate how some of these new and different aspects of remote civil trial will affect their outcome.

One positive result of remote trials is that jurors seem more willing to respond to their jury summons if they are only required to appear remotely. Also, some courts have been making remote appearances easier for people with no computer access by shipping them the electronics, or providing access to public computers in a library. This could potentially result in a hybrid system where jurors are assembled remotely, but appear personally for the trial. Only time will tell.

Published Monthly by California Association of Independent Insurance Adjusters	
	An Employer Organization of Independent Insurance Adjusters

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Presidents Message – October 2020

Well, almost my last message...

As mentioned in my last Presidents message Rick Kern will take over as President of our organization.

As many of you may know Rick is a Partner at Schiffrin, Gagnon and Dickey, and is located in and is responsible for their San Diego office. Rick's background is primarily working as a multi-line adjuster with an emphasis on liability claims. For the last 15+ years, Rick has been administrating liability claims for multiple programs.

Because Rick was heading out on vacation, I asked him to put together a brief hello below..

*Hi, I'm Richard Kern, the soon to be President of our association. The world sure has changed a lot in the last 6 months. I'm looking forward to working with our members to confront the ever-changing landscape here in California. I'll tell you all about me in the November newsletter...Stay tuned."*

We look forward to Rick guiding us as our new President....

Please remember that on October 9<sup>th</sup>, we will be holding our annual fall meeting and swearing in Rick as our new CAIIA president. In the next few days I am hoping that we can send out an email to all of our members providing details on how to login in order to attend our virtual meeting held on that date. Hope to see you then.

With much appreciation, John



John Ratto  
CAIIA President



***Daylight Savings Time ends on  
Sunday, November 1st.***

## CAIIA Fall Meeting October 9th

**Login details coming soon to your inbox!**

### ***Press Release from the Insurance Commissioner:***

#### **Commissioner Lara urges insurance companies to cover reimbursement costs for those displaced during wildfires**

**LOS ANGELES, Calif.** — To assist Californians displaced by the current and recent wildfires throughout the state, Insurance Commissioner Ricardo Lara issued a [Notice](#) to all California property and casualty insurance companies urging them to cover Additional Living Expenses (ALE) for those policyholders who remain under mandatory evacuation or whose homes are otherwise inaccessible or uninhabitable due to the wildfires.

"When people are told to get out of harm's way by first responders, they should be able to access insurance benefits, not be forced to pay out of pocket for necessary emergency costs when they are still under evacuation orders or without water or power," said Commissioner Lara. "While I have sponsored legislation to address this issue, people need help now to recover from these devastating fires."

All homeowners' insurance policies provide benefits for loss of use or ALE to cover the extra costs associated with temporary lodging, transportation, clothing, and other necessities caused by a covered peril, such as a wildfire, that renders the home uninhabitable or inaccessible. Homeowners' insurance policies also cover ALE if access to the home is restricted in cases where a civil authority has issued mandatory evacuation orders from the recent and ongoing wildfires impacting most of the state.

"When you've lost the use of your home due to a disaster, you have a reasonable expectation that the insurance you've been paying for will cover your temporary living expenses," said Amy Bach, Executive Director of United Policyholders. "That's one of the primary benefits of home insurance. We commend Commissioner Lara for reminding insurers of this very basic, important obligation."

The Department of Insurance has received numerous complaints from policyholders who are hearing from insurance companies that their ALE benefits are being terminated after the initial two weeks unless the insurance company can verify, or the policyholder can prove, that the policyholder's property suffered damage due to the fires and is still currently uninhabitable, even though mandatory evacuation orders are still in effect in some areas. The Department has also received several related consumer complaints of ALE benefits being discontinued when their homes are uninhabitable due to lost power or water service as a result of the wildfires.

Commissioner Lara sponsored Senate Bill 872, authored by Senator Bill Dodd, this legislative year to address these and other insurance claims issues following a wildfire emergency. The bill has passed the State Legislature with strong bipartisan support and is now heading to the Governor for his consideration. SB 872 would allow for an extension of the two-week limit that is currently in place, and allow for coverage when a home is not damaged but is otherwise uninhabitable for another reason, such as having no electricity or water service caused by a covered peril. The bill would also require an advance payment of no less than four months for costs for living expenses and mandate an advance payment of no less than 25 percent of a policy limit for lost contents without submission of an inventory form, among other consumer protections.

### **Whose Fault is it? Credit to Garrett Engineering, Long Beach, CA**

Imagine you are driving in stop and go traffic. It is night. You have two other lanes to your right, and a left hand turn lane on your left. Traffic comes to a stop. Then it begins to creep forward and then it stops again. Then it slowly starts rolling again. Then all lanes come to a stop again. You have been patiently waiting to approach the next traffic light, where you will turn left. While all traffic is stopped, you slowly edge into the empty left turn lane, taking care not to pull into the path of an overtaking vehicle already in the left turn lane.

You slowly increase your speed to about 15 mph. All of the sudden, a man steps out from between the stopped cars on your right directly into your path. You hit him. Is it your fault?

This is what happened to our client's insured. "Whose fault was it?" Could the driver have prevented the accident?

The general topic of an analysis of pedestrian/vehicle accidents can be separated into several sections.

The initial section is the **perception** period. The first part is a measure of the amount of time that it takes for the driver to notice that there is something (or anything) present in the roadway. While we typically assume that the driver has his eyes on the road 100% of the time, generally that isn't very accurate. The driver may occasionally be looking in the side and rear view mirrors. The driver occasionally drops his vision onto the instrument panel or at the radio. The driver may be sweeping the roadway back or forth with their eyes and then stay focused on a blinking turn signal of that box truck ahead, wondering if it is going to move out of the lane. The time it takes for the driver to perceive that there is something in the roadway varies considerably due to these effects. Additionally, drivers are pretty good at detecting movement, but not so good at detecting changes. Was that round stationary figure on the right shoulder there three seconds ago? Maybe.

Next is the **analysis and categorization** of what we are looking at, once we are aware that something is there. Is that dark thing a person? Is it a bicycle? Is it a tree branch? Is it a black cow or is it smoke from a campfire? The more visual cues we get, the faster we can identify an object. Shape, color, outline, and contrast are necessary to help us understand what we perceive. Unexpected shapes can play a large part in delaying identification.

The next phase is the period of time spent **deciding what to do**: swerve, brake, or accelerate? This is a pretty short length of time for most experienced drivers, but throw in the unexpected, and decision paralysis can occur.

The next section is the **reaction** period. This has two components. The first is the time it takes for the foot to lift from the accelerator pedal and press onto the brake pedal. The second is the time it takes the vehicle to come to a stop after the driver reaches full pressure on the brake pedal. This is also dependent upon many factors. The condition of the tires and brakes and the coefficient of friction of the roadway are the most important (new tires and fresh asphalt versus bald tires and black ice).

The accident reconstruction community has performed thousands of scientifically rigorous research studies and projects related to these factors and has established guidelines of what to expect in these situations.

For this case, our expert reviewed the documentation provided by the client, which included a description of the collision and the police report.

The pedestrian was crossing a 4-lane roadway in an area without a crosswalk. There were three through lanes and a left hand turn lane. The traffic in the three through lanes was stop and go and the pedestrian was crossing between stopped vehicles. The left turn lane was open, and the insured driver was driving in that lane at 15 mph. The pedestrian was relatively short in stature and presumably could not be seen over the top of the stopped vehicles in the right lanes.

A commonly agreed upon daytime perception/reaction time is 1.5 seconds, half to perceive the danger and half to react to this danger. This perception/reaction time has been a standard used in accident reconstructions for many years. Slide or skid-to-stop formulas use a friction factor for the roadway of this type at generally .65 to .75 g. Due to anti-lock braking of this particular vehicle, this factor can be increased to a friction factor of .9 g. This would indicate a very hard braking stop with anti-lock brakes. Using the 1.5 seconds perception/reaction time, the driver would travel 33 feet during perception/reaction. Once the driver reacted to the danger and applied the brakes, it would have taken about 8 feet and .75 seconds to stop. This adds up to 41 feet total distance to stop and 2.25 seconds to do so. This assumes a daytime accident.

There are many studies with differing types of collisions that show nighttime perception/reaction times to be considerably longer. In this case the expert used a 2.5 second night perception/reaction time. The time and distance of the stopping remained the same, 8 feet and .75 seconds. The longer perception/reaction time would equal a distance of 55 feet of travel during perception/reaction, totaling 63 feet and 3.25 seconds to complete stop.

In summary, given the facts presented in this case, there was no way for the driver to have avoided the accident. It was not her fault.

## Age Discrimination

### Credit to Tyson & Mendes. La Jolla, CA

Being an employer these days can be a real minefield. Some employers are downright paranoid about discrimination and harassment lawsuits. So much so that they often have a no-tolerance policy about any type of comments about a person's age, race, sexual preference, etc. *Arnold v. Dignity Health* (Cal. Ct. App., July 17, 2020, No. C087465) presents the question of whether routine comments about a person's protected status (whether it be age, race, or sexual preference, etc.) are sufficient evidence to defeat a summary judgment motion where the employer can point to legitimate non-discriminatory reasons for termination. The answer, according to the Third District Court of Appeal, is no.

In 2003, when Virginia Arnold was about 55 years old, she was hired as a medical assistant at Dignity Health. After a few years of employment, she began to receive various write-ups for her performance and personal conduct. These write-ups occurred in 2008 (failed to remove a patient's identifying information from a urine sample cup), 2011 (warned not to work off-the-clock, 2012 (being disrespectful and aggressive toward a coworker) and then in 2013 (additional work misconduct and not being truthful about that incident). The last warning in 2013 was with a new supervisor. Since she was already on a final warning, the new supervisor terminated her. The termination letter cited the 2013 incidents but also the prior warnings and suspension.

Arnold sued. Among other causes of action, she sued for discrimination and harassment based on her age and her association with African Americans. Dignity Health filed for summary judgment and won. (A quick practitioner's note: the trial court dismissed her other claims because although Arnold claimed she was appealing the entire judgment, she did not address the other causes of action in separate headings or directly. So even if the claims are derivative, they should at least be addressed in that manner.)

In support of her age discrimination claim, Arnold indicated after a birthday, her supervisors made comments about her age and retiring such as:

"Oh, I never knew you were that old."

"Oh, how come you haven't retired?"

"Gosh, I can't believe you are that old."

These comments, which would probably make most HR Directors quite nervous, were insufficient to satisfy Arnold's burden on summary judgment which was to provide evidence sufficient to establish a triable issue of fact as to whether the alleged discrimination was a "substantial motivating factor in the adverse employment decision." The appellate court held, with respect to the comments made by Arnold's prior supervisors, there was no evidence that the persons who made those comments were directly linked to the decision to terminate Arnold.

But more importantly, the appellate court held even if the prior supervisors were involved in Arnold's termination, there was insufficient evidence to support the conclusion that these fairly generic age-based comments were made with discriminatory animus. The appellate court reasoned a person's birthday was a fairly natural and appropriate time to discuss their age and retirement plans. And the other age-based comments Arnold cited were more surprise at her age and agreement with the surprise. Arnold tried to add a negative connotation to the comments by saying they were made in an intimidating tone. But the appellate court held even if that were true, it was "only sufficient to raise a weak suspicion of discriminatory animus and does not amount to substantial evidence of discriminatory animus necessary to defeat a summary judgment motion."

One final bit of reasonable analysis by the appellate court regarded Arnold's claim that Dignity Health failed to follow its usual disciplinary policy (another fact which raises hairs on the back of HR Director's necks). But the appellate court shot the argument down as well surmising although it might suggest the employer was trying to hide the true and discriminatory reason for the termination, here there was insufficient evidence in the first place of a discriminatory reason.

Although employers should maintain robust and comprehensive non-discriminatory and non-harassment policies at the workplace, it's refreshing to read an opinion that puts at least some modicum of reasonableness back into routine workplace comments, even if they are about age, race, or other protected statuses.

## **Moratorium on Evictions** **Credit to Tyson & Mendes, La Jolla, CA**

On August 13, 2020, the Judicial Council of California voted to amend its Emergency Rules 1 and 2 adopted on April 6, 2020 in response to the COVID-19 pandemic. The amendments provide an end date for the moratorium on California's evictions and stay on foreclosures.

In voting to amend Emergency Rules 1 and 2, the Judicial Council noted it initially acted following California Governor Newsom's March 4, 2020 declaration of a state of emergency. The Emergency Rules were put into effect to provide protections to California citizens during a period when the legislature was unable to act. For that reason, the Emergency Rules were designed to be temporary. The Judicial Council's recent action is intended to cede authority over these issues back to the California legislature.

### **Unlawful Detainer Protections and Limitations Expire September 1, 2020**

Emergency Rule 1 relates to unlawful detainers (also known as evictions). The emergency rule limited courts from proceeding with unlawful actions in several ways. First, the rule prohibited courts from issuing a summons in an unlawful detainer matter unless "necessary to protect public health and safety." Default could not be entered against a defendant unless he or she failed to timely appear in response to an unlawful detainer action and the suit was "necessary to protect public health and safety." Trial dates could not be set sooner than 60 days after the parties requested a trial date and all trial dates currently set were continued for at least 60 days.

Emergency Rule 1 was to remain in effect until 90 days after the Governor of California lifted the declaration of emergency relating to the COVID-19 virus, or until amended or repealed by the Judicial Council.

On August 13, 2020, the Judicial Council approved an amendment to Emergency Rule 1. The amendment means the rule will expire on September 1, 2020.] This means California courts may issue summonses, enter defaults and set trial dates in unlawful detainer actions effective September 2, 2020.

### **The Stay on Foreclosures Terminates on September 1, 2020**

Emergency Rule 2 relates to foreclosure actions. This emergency rule stayed foreclosure actions on certain mortgages and deeds of trust, tolled the statute of limitations for filing a foreclosure action, and extended the time to exercise the right of redemption.

Emergency Rule 2 was also to remain in effect until 90 days after the Governor of California lifted the declaration of emergency relating to the COVID-19 virus, or until amended or repealed by the Judicial Council.

On August 13, 2020, the Judicial Council approved an amendment to Emergency Rule 2. The amendment terminates the stay of foreclosures after September 1, 2020. In addition, the amendment removes the provision extending the statute of limitations to file a foreclosure action as duplicative of Emergency Rule 9. As amended, Emergency Rule 9 tolls causes of action with statute of limitations of less than 180 days between April 6, 2020 and August 3, 2020 and tolls causes of action with statutes of limitations of greater than 180 days from April 6, 2020 to October 1, 2020. This means foreclosure actions may proceed as of September 2, 2020. In addition, the amount of time the action was tolled should not be included in determining the due date for filing the action.

### **The Tenant Protection Act of 2019 Remains in Effect**

Although the moratorium on evictions is ending, landlords remain obligated to limit evictions to those permitted by law. California renters have benefited from a new rent control ordinance effective January 1, 2020. The statute began life as AB 1482 before its acceptance and codification into the California Civil Code.

In addition to setting rent caps, the Tenant Protection Act of 2019 prevents landlords from evicting tenants from most properties without just cause. "At fault" just cause for an eviction includes failure to pay rent, breach of material lease term, creating a nuisance, committing waste, refusal to enter into a lease extension for a similar term, criminal activity, unauthorized subleasing, refusing entry to the property owner, unlawful use of the property and failure to vacate and surrender possession.

"No fault" just cause for terminating a renter's tenancy includes the landlord's intention to demolish or substantially renovate the premises, to take the property off the rental market, to personally occupy the property, to allow the landlord's close family member to occupy the property, or to comply with a government order.

The Tenant Protection Act of 2019 limits the circumstances under which a tenant may be evicted. Landlords should educate themselves regarding these limitations and consult counsel as necessary prior to initiating an unlawful detainer proceeding.

### **No New Action by the Federal Government to Stop Evictions or Foreclosures**

Currently, there are no federal rules prohibiting landlords from proceeding with unlawful detainer and foreclosure actions in California on and after September 2, 2020. There is enormous social and political pressure to act on this issue, however, and action will likely be taken by the California legislature, Governor Newsom, Congress or President Trump in the coming days.

On August 8, 2020, President Trump issued Executive Order 13945 (EO 13945), addressing the impact of COVID-19 on the risk of evictions and homelessness. While EO 13945 articulates a policy to minimize residential evictions and foreclosures and pledges to "take all lawful measures to prevent residential evictions and foreclosures resulting from financial hardships caused by COVID-19," it does nothing to stop evictions or foreclosures. Instead, EO 13945 instructs the Secretary of the Treasury, the Secretary of Housing and Urban Development, and the Director of the Federal Finance Housing Agency to consider measures to halt evictions and foreclosures, identify sources of funding to provide temporary rental assistance and to "take action" and encourage the ability of renters and homeowners to avoid eviction as well as review existing authorities and resources which may be of aid in preventing evictions and foreclosures.

While EO 13945 suggests the President intends further action to be taken to halt evictions and foreclosures, it appears the administration is still in the process of evaluating the means and methods of accomplishing this goal. Until further action is taken, federal law will not prevent evictions and foreclosures from recommencing in California once September 2, 2020 arrives.

## On the Lighter Side: Butterfly Season in California



### Looking for an interesting day trip or stay-cation?

Monarch Butterflies are some of the most amazing living things you can see in California. The delicate, jewel-like, orange and black Monarch butterfly spends a few months of its unusual life cycle in California. They're easy—and beautiful—to watch from many spots along the coast. **Don't forget to call before making plans as COVID may affect the hours or status of these places!**

#### How to See Monarch Butterflies in California

You can see the monarch butterflies in California from mid-October through February. They're stopping off to mate before moving on, but they don't just pair up. They also gather in basketball-sized clusters while they sleep in eucalyptus and pine trees along the coast. When the sunshine warms the trees, thousand of the orange and black butterflies rustle and stir, and they take flight. As temperatures rise and the days get longer, the butterflies mate. During that time, you may see them doing spiral mating flights. By the end of February or early March, they fly away to begin their migration cycle.

#### Tips for Seeing the Monarch Butterflies

If you want to see the butterflies taking off from their favorite groves of trees, you have to go at the right time of day. If you get there too early, you might lose patience and leave before they start to fly. If you get there too late, they will be gone for the day. The butterflies won't fly at all if the temperature is less than 57 F (14 C). They also don't fly on cloudy days. If the weather conditions cooperate, on most days, they will start flying during the warmest part of the day between noon and 3:00 p.m. Watching Spots in California  
The monarch butterflies spend winter along the California coast between Mendocino County and [San Diego](#). The spots listed below are the most popular and easiest to reach, but they aren't the only places you can go to. Most sites south of [Santa Barbara](#) and north of [Santa Cruz](#) have far fewer butterflies to see.

#### Santa Cruz

[Natural Bridges State Beach](#) is accessible to everyone. The best time to see butterflies there is from mid-October to late January. Guided tours are given on weekends from early October until the monarchs leave.  
<https://arboretum.ucsc.edu/visit/garden/other-gardens/butterfly/index.html>

#### Pacific Grove

The [Pacific Grove Monarch Grove Sanctuary](#) is so spectacular that the town of Pacific Grove is nicknamed "Butterfly Town, U.S.A." Docents are on hand during butterfly season.

#### Santa Barbara

At the [Ellwood Main Monarch Grove](#) in Goleta just north of Santa Barbara, as many as 50,000 monarch butterflies spend the winter. The best time to see them take off is when the sun is straight overhead, between noon and 2:00 p.m. You can also see the butterflies at neighboring [Coronado Butterfly Preserve](#).

#### Pismo Beach

In some years, the [Pismo Beach Monarch Grove](#) hosts the most monarch butterflies in California. It's in an open area with lots of sunlight - and consequently more chance of seeing monarchs flying.

You may also find the butterflies at [Pismo State Beach](#), at the south end of the North Beach Campground.

Other spots to view the Monarchs:

<https://gardens.ucr.edu/gardens>

<https://www.butterflyfarms.org/>

#### Interesting Facts

A monarch butterfly weighs less than 1 gram. That's less than the weight of a paper clip, but it can pull off a migration that would leave stronger animals, and most humans, exhausted.

The butterfly's round-trip journey covers some 1,800 miles (2,900 km).

They go for a long distance, but they don't travel fast. In fact, four generations of butterflies live and die before their descendants return to the place where their ancestors started.

The first generation begins the migration cycle in the winter along the California coast. While there, they cluster in the trees for protection from storms and for warmth. They mate in late January and fly away by March at the latest.

That first generation of monarchs lay their eggs inland on milkweed plants in the Sierra Nevada foothills, and then they die. Their offspring (the second generation) hatches in the mountains. From there, they fly to Oregon, Nevada, or Arizona. Third and fourth Monarch butterfly generations fan out even further.

Finally, they return to the California coast, to the place where their great-great-grandparents started.